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Workers' compensation claims for precariously employed workers in Ontario: employer resistance and workers' limited voice

L'indemnisation des travailleurs précaires en Ontario : résistance des employeurs et droit de parole limité pour les victimes de lésions professionnelles

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- 1 The policies and practices of workers' compensation have barely kept pace with the changing worker and employer needs created by the growth of precarious forms of employment. This study focused on how well workers' compensation and RTW policies in Ontario fit the needs of precariously employed workers. A critical discourse analysis guided our study which consisted of in-depth interviews with 15 precariously-employed workers and 5 employers who had hired and managed these kinds of workers. Three domains where RTW policies that fit uneasily with the experiences of precariously-employed workers were identified. These related to knowledge and power contrasts between well-informed employers and vulnerable workers, injury attribution challenges, and worker fear of speaking up about accidents. This study suggests that workers' compensation and RTW policies rest uneasily with the circumstances of precariously-employed workers. In particular, it was difficult for workers to engage with workers' compensation when employers resisted this process.
- 2 Developments in communication and other technologies, together with globalization of economies, have led to flexible labour markets and changing forms of work. In particular, since the 1990's, advanced economies have seen a growth of precarious employment (Kalleberg, 2011). By precarious, we refer to limited term contracts (Galarneau, 2010), including temporary agency work (Bartkiw, 2018 ; Ducharme-Varin, Vergara & Raynault, 2016), self-employment (Lippel and Laflamme, 2011) including gig work (Bartel et al., 2019 ; De Stefano, 2016) and part-time, and minimum wage work. What these forms of work have in common is that they provide flexibility for

employers in contexts of uncertain and competitive trading economies while also downloading risk to workers, including creating a lack of income security (Broughton et al., 2016).

- 3 Restricted worker bargaining power, limited workplace rights, and reduced social protection are all found with precarious employment (Benach et al., 2014). While precarious employment has been most often associated with low wages (Benach et al., 2014 ; Burleton et al., 2013), recent research in Ontario, Canada, shows that precarity is widespread and includes those with higher income and education levels (Lewchuk et al., 2014). Precarious employment is associated with poor mental health (Han et al., 2017 ; Ronnblad et al., 2019), greater exposure to work hazards than workers in standard jobs, and limited manager and worker knowledge about health and safety regulatory responsibilities (Howard, 2017 ; MacEachen et al., 2018 ; Quinlan, 2004). Research on temporary work agencies has identified that employment and safety hazards include poor training, lack of familiarity with the workplace, fractured communication, and financial incentives for client employers to maintain unsafe work conditions and practices (MacEachen et al., 2012 ; Quinlan, Bohle & Rawlings-Way, 2015 ; Underhill and Quinlan, 2011).
- 4 Although the growth of precarious employment has driven thinking and policy recommendations on how to address impacts of income insecurity, these have tended to focus on welfare state regimes (Benach et al., 2014) or on employment standards (Weil, 2019). However, precarious employment has also limited workers' access to work disability systems, such as workers' compensation, as regulatory provisions were historically designed to protect workers in the standard employment relationship, based on full time, and indefinite work contracts. Workers' compensation systems were created in Canada in the early 1900's to provide income support and health care to workers who became injured or ill in the course of their employment. This system was developed following a situation where juries began to favour workers and employers found themselves suffering financial losses when losing injury cases under tort law. Workers' compensation systems created a "no fault" arrangement that provided employers with the financial security of not being sued, and provided injured workers with healthcare and income support (AWCBC, 2013). At this time, workers' compensation systems did not anticipate precarious employment relationships. Still today, most regulators have failed to adapt labour standards, workers' compensation and occupational health and safety laws to the needs of the various categories of precariously employed workers (Bartkiw, 2018 ; Ducharme-Varin, Vergara & Raynault, 2016 ; Vosko et al., 2018). For instance, in Ontario self-employed workers are not required to have WSIB coverage unless they work in the construction sector. This leaves most self-employed workers, including the growing cohort of gig workers, without income protection if they become ill or injured (MacEachen et al., 2019). As well, workers capable of working full time are often forced to work part-time or to hold temporary jobs because they can't find full time employment (Lewchuk, Clarke & de Wolff, 2008 ; Patterson, 2018). When injured, their inability to work means lost income from the job they were holding but also lost ability to earn income full-time. Quebec workers' compensation legislation acknowledges this by presuming all workers are capable of earning full time minimum wage at the time of their injury ; however, in Ontario part-time workers receive income benefits based only on 85 % of the net wage earned from their current job, often an unsustainable amount on which to live (Lippel,

2019). Each of these situations show the ill-fit between policies designed for workers in standard employment relationships compared with those in precarious arrangements.

- 5 What we know less about is how workers who are precariously employed, some of whom fall within the scope of eligibility for workers' compensation coverage and rights to reasonable accommodation and return-to-work support, actually access these supports. Therefore, our study was focused on understanding how well workers' compensation and RTW policies fit with the circumstances and needs of precarious workers. To do this, we focused on Ontario, Canada, and examined what role employers played in supporting the rights of precariously employed workers to access resources such as workers' compensation, and how precariously employed workers experienced accessing their rights to work disability supports.

1. Methodology

- 6 This study¹ extends the literature on precarious employment and work injury by drawing together and comparing employer and worker accounts of work injury and the compensation claim filing process. Our qualitative study was guided by a critical discourse analysis approach, which captures how people think and talk about situations (Hodges, Kuper & Reeves, 2008).
- 7 The study, conducted in 2017, was based in Ontario, Canada, where the Workplace Safety and Insurance Board (WSIB), provides workers' compensation insurance protection to approximately 75 % of employed workers (AWCBA, 2016). WSIB insurance requires mandatory coverage of self-employed construction workers but not of other self-employed individuals, although they may (but rarely do) "opt in" to coverage. Employers are required to report all work-related injuries to WSIB, or risk a hefty fine of \$ 500,000 (Workplace Safety and Insurance Act, 1997b). When an illness or injury arises from work, covered workers are entitled to salary replacement benefits, health care, and accommodated workplace tasks during employment reintegration. As well, employers are obliged to provide accommodations to workers up to the point of undue hardship (Workplace Safety and Insurance Act, 1997a). When accommodation is required for a worker injured on the job who has filed a claim for workers' compensation the compensation board, the WSIB is proactively involved in ensuring that the employer complies with the legislation and accommodates the injured worker as early as possible.

2. Sample and data

- 8 Our sample consisted of in-depth, semi-structured interviews with precariously-employed workers and with employers who hired these kinds of workers. Our definition of precarious employment included workers who had temporary/limited term employment contracts, worked part-time, were paid minimum wage, or who were self-employed. Our purposive sampling strategy targeted any workers meeting these precarious employment criteria, who could communicate in English and who within the past 10 years had experienced a workplace injury or illness that would warrant a lost-time workers' compensation claim. Workers were included whether or not they had filed a WSIB claim.

- 9 We recruited workers via social media (e.g. Kijiji, Craig's List), fliers posted in public locations, and through leads provided by members of our study's Advisory Committee. An honorarium of \$ 50 was paid to participating workers to cover any costs related to their participation. Our employer sample included any employers who had hired and managed precariously-employed workers and had experience of managing work injury among these workers. The employers were identified via website searches and then recruited through cold-calling. For the purpose of our study, we use the term "employer" to denote anyone in a managerial position who played a role in managing precariously employed workers.
- 10 Our final sample included 20 participants : 15 workers and 5 employers. The workers included 7 women and 8 men. Seven worked for temporary work agencies, 4 were on seasonal or limited term contracts, and the remaining 4 were minimum waged (also part-time for 2). None of the workers were temporary foreign workers employed through government programs. The 5 employers occupied the following roles : director of human resources, occupational health nurse, sales manager, recruitment supervisor, and health and safety coordinator. They came from temporary work agencies, mines, and a cleaning and maintenance company. See Table 1 for sample detail.

Table 1. Sample

Pseudonym	Worker / Employer	Gender	Type of Precarious work / Employer
Jason	W	M	Temporary employment agency
Seth	W	M	Fixed-term contract
Alice	W	F	Seasonal worker
Ben	W	M	Temporary employment agency
Mary	W	F	Seasonal worker
Scott	W	M	Temporary employment agency
Peter	W	M	Temporary employment agency
Kobe	W	M	Temporary employment agency
Victor	W	M	Fixed-term contract
Louise	W	F	Probationary contract
Shannon	W	F	Temporary employment agency
Gretchen	W	F	Part-time, minimum wage
Yvonne	W	F	Part-time, minimum wage
Brenda	W	F	Part-time
David	W	M	Temporary employment agency

Lauren	E	F	Cleaning/maintenance company
Marisa	E	F	Temporary employment agency
Lucas	E	M	Temporary employment agency
Claire	E	F	Mine
Jessica	E	F	Mine

- 11 Two aspects of this sample are worth noting. First, a complexity in the employment relationship for temporary agency workers and employers as compared to others in this sample is the triangular nature of temporary agency employment relationships. That is, although the temporary agency is the legal employer of the temporary worker, it is the client employer to whom they are sent who directly oversees the worker's working conditions and performance. With this arrangement, agency workers are exposed to particular work and health-related communication gaps and safety risks (MacEachen et al., 2012). A second aspect of this sample is that employers who agreed to be interviewed might have been the "better" ones. That is, employers with poorer working conditions might not have wished to participate in this study. As such, conditions for workers may be less favorable than what emerged in our results below.
- 12 Interviews were conducted in-person or by telephone and lasted on average one hour. Questions to workers focused on describing their job and workplace, their injury and related contact with workplace managers and workers' compensation, their experience with return to work (if relevant) and the impact of their injury on their lives. Employers were asked about their job and workplace, their role and experience of work injury and return to work for workers under their supervision, their view and knowledge of workers' compensation return to work policies, and their particular experiences with managing return to work for precariously employed workers. Detailed field notes were prepared following each interview to capture the context of the encounter (processes for setting up the interview, mood of the interview, e.g. participant nervousness) as well as analytic notes related to the interview (reflections on new interview questions that might be posed, how this interview compares to others, new insights in this interview).
- 13 Ethical approval for this study was provided by the University of Waterloo Office of Research Ethics and the Office of Research Ethics at the University of Ottawa. All interviews were conducted with informed consent and participants were assured of confidentiality and anonymity. No personal identifiers were used and each participant was assigned a pseudonym.

3. Data management and analysis

- 14 A concurrent data gathering and analysis approach was used to analyze data. This approach allowed us to adjust and improve interview questions as we learned more about our topic. For instance, we added a question to ask employers specifically about self-employed workers on their premises following a worker interview that drew attention to this issue. All interviews were audio-recorded and transcribed verbatim by

an experienced transcriptionist and organized using NVivo qualitative software (QSR International (version 10), 2014). Codes were developed by the team based on established areas of analytic interest (such as “workplace accommodations”, and also on codes that developed as we analyzed the data, such as “misrepresentation”, which captured participant interactions around return to work rights and obligations. Analysis of discourse proceeded through detailed readings of field notes and transcripts, and through comparing coded segments across interviews. Detailed summaries were made of each code. The critical examination of discourse focused analytic attention on the positionality of the speaker, their investment in the situation, and how they described events. For instance, when the temporary agency manager described WSIB agents as “on our side”, this provided insight into power relations between employers and workers in relation to compensation claims, and also the importance to the agency of cultivating preferential relationships with WSIB agents. During this analysis, regular investigator meetings were held to interrogate the data and form conclusions for the study findings.

4. Findings

- 15 Our findings focus on three key domains where the RTW policies appear to fit uneasily with the experiences of precariously employed workers. First, we show the knowledge and power contrast between well-informed employers and vulnerable workers and explain how this shapes employer support of RTW. Second, we address the problematic issue of injury attribution for workers who regularly change jobs. Finally, we address workers' ability to speak up when they are insecurely employed.

5. Knowledge and power differences

- 16 Although the Workplace Safety and Insurance Act that governs the WSIB obliges Ontario employers to accommodate injured workers, we found that employers in our study did not always offer accommodations to support workers' RTW and workers did not always know that they were entitled to them. A key challenge for the precariously employed workers in our study was that they were injured while also financially insecure and inexperienced at navigating employment and compensation systems. In contrast, the employers in our study were strategic and well-informed. In particular, by hiring workers on limited term contracts or via temporary work agencies, employers were calculating in their approach to limiting the cost and use of human resources.
- 17 Unlike workers who, prior to their work injury, often had little experience of how to navigate workers' compensation systems, the employers in our study had experience and knowledge of the system. Indeed, some had developed familiar relationships with compensation agents and hinted at receiving preferential treatment from them :

We are organized, we have everything up to date.... Usually they [WSIB] are on our side... We have had a pretty good rapport with them. (Lucas, temporary work agency manager)
- 18 Employers' strategic use of labour was evident when they used self-employed contractors to complete tasks, as this removed them from employer-related obligations. The goal, when hiring such workers for specific tasks was simply to get the job done, and not to be responsible for any resulting injuries :

How could we give [self-employed contractors] modified work [following a work-related injury]? They have a specific contract to do a specific job. If they cannot do it, we will take someone else because it has to be done. (Claire, occupational health nurse)

- 19 A similar strategic mindset was found among temporary work agencies, such as this employer who described the need to take a “business perspective” that screened out employment for workers who were injured or unhealthy :

A client ... would be, you know, looking for the best of the best when it comes to workers.... If a worker comes and they have got, you know, a previous work-related injury on their ... record ...like I am thinking from my business perspective. (Lucas, temporary work agency manager)

- 20 A challenge faced by workers who were employed on temporary contracts is that they were screened by employers for health status over and over again, each time they sought a new contract. This repeated screening exposed workers to employers who used strategies to actively avoid relationships with workers who might experience or complain about a work injury. For example, this temporary agency employer described how she used what seemed like a caring approach to interview workers, while actively screening out workers on the basis of health :

On our application process it does ask...about allergies and if there's any... physical restrictions that...we may have to take into consideration when placing them at a job.... So they actually fill all of that out and, and then during the interview process we ... go over it again and, and I mean you are going to be blown away by the amount of people that go, “Oh, well ... there was that time when I hurt my back”, and blah, blah, blah. Well, red flag, you know what I mean ? (Marissa, temp agency employer)

- 21 When workers passed employers' screening process but then later experienced a work-related injury, employers in our study activated new strategies for limiting their compensation-related costs and responsibility. Some mis-informed workers by telling them that they were not eligible for workers' compensation. Workers who were told this felt they had little recourse other than to accept their situation :

They said again that they wouldn't be able to assist me because it had been a contract where no staff had been listed on the invoice. So ... they had no record of any of their staff actually working for the banquet hall. ... And I was told I could be easily replaced, so not in so many words but that was... the consensus. (Scott, temp agency worker)

- 22 In another case, an employer simply laid off a young and inexperienced worker who was on a probationary contract for a full-time permanent position. The employer made no reference to the worker's right to access workers' compensation. The worker, who sustained lasting injuries, was at the time not familiar with the concept of accommodation and compensation and did not access it :

[My boss] called and she was like, “Oh, I heard ... you got hurt. I just want to hear about that.” She is like, “I am sorry to hear about all this. I was just taking a look over your files and I see that ...you have been great ... however we are going to have to determine whether you are still a good fit given the nature of the job. (Louise, full-time worker, probationary contract)

- 23 Not all workers in our study were unaware of workers' compensation and their rights to claim benefits. However, the workers who did try to activate their right to claim describe being met with employer resistance. For instance, one minimum-wage retail worker who sustained a serious eye injury at work managed to file a successful workers' compensation claim by drawing in paperwork from her family doctor.

However, during the work accommodation process, she found herself being assigned to increasingly poor shifts and, in the context of this negative social environment, she decided to quit her job. This subtle bullying of the worker, in turn, successfully removed all costs and liability from the employer.

6. The problem of injury attribution

- 24 A second key domain where the RTW policies appear to fit uneasily with the experiences of precariously employed workers was injury attribution. Essentially, when workers changed jobs regularly, or had two part-time jobs, employers could avoid responsibility because it became difficult for workers to attribute an injury to a specific workplace. In the case of a worker with two concurrent jobs, an employer could quite easily contest liability by suggesting that the injury occurred at the “other” job. A worker in our study who faced this situation quickly chose to discontinue her workers’ compensation claim, for fear of jeopardizing her continued employment at her main job :

So I submitted the claim to the WSIB and then I spoke to the ... manager [at my workplace] and I expressed desire to return to accommodated work in the box office. She said, “We know you didn’t injure yourself on the job”. She said, “Well, we know that you did it [at your] dog walking [gig]”. (Gretchen, minimum wage, entertainment sector)

- 25 The burden of proof for workers’ compensation claims appeared to rest with the workers, rather than with the employer. In this next situation, a young worker had a seasonal job in the forestry sector where her colleagues were temporary foreign workers when she fell and hurt her back. The workers’ compensation board requested witness testimony, which was not possible because the workers had dispersed and returned to their home countries. The worker found her claim denied :

They [WSIB] called me... and they needed proof that it had happened and I was saying that ... the only person who had been there when I actually got hurt was my co-worker but he had moved back to South America and I didn’t have a contact number for him. So ... they said, they would ... try and find a contact number for him and then I got a letter a week later saying they had rejected it [my WSIB claim]. (Alice, seasonal forest worker)

- 26 Employers in our study voiced suspicion of precariously employed workers who filed claims for workers’ compensation. Indeed, some suggested that workers intentionally or carelessly injured themselves :

So, if it’s a situation where they were being unsafe almost intentionally and they ended up getting injured, I mean, obviously we try to say, “Alright, what did we do wrong here ? What could we have done to.... prevent this injury ?” If the person was...not doing what they were supposed to be doing, we are going to write them up for it. And a lot of cases an employer or a client would not want them back for that.... They are just a danger to themselves and others. (Lucas, temporary work agency manager)

- 27 Injury attribution left workers in a difficult situation. WSIB and employers raised doubts about the veracity of injuries, and one employer went so far as to suggest intentional injuries.

7. Workers' ability to speak up

- 28 Workers' ability to speak up about employment conditions in the context of precarious employment arrangements was a third key domain where the RTW policies appear to fit uneasily with the experiences of precariously employed workers. Although worker awareness raising and knowledge of their health and safety rights is often a focus for policy-makers (Dean, 2010), this strategy appeared to be ineffective in the context of precarious work conditions. That is, even when precariously employed workers were fully aware of their rights to access workers' compensation, they were also keenly aware that doing so may mean loss of their employment. In the following example, a personal support worker was too fearful to file a claim, despite being urged to file by her family doctor :

She [family doctor] wanted me to [file a WSIB claim] That's one thing I really, really ... regret not doing [because of ongoing health problems]. I didn't end up filling it out because I was in such fear about my company. I was worried that they might come after me. I was worried that they might fire me. I was worried that they might give me less shifts.... Like, I was just had so much anxiety. I was just constantly fearful that I basically didn't do anything". (Shannon, nursing temp agency worker)

- 29 Employers in our study were aware that workers were fearful of speaking up about work-related injuries for fear of losing their jobs. Indeed, one employer described workers trying to maintain their employability by explaining away work injuries as "personal illnesses" or not declaring them :

I see a difference [between permanent workers and those on fixed-term contracts] in the sense that they, when they have an injury some of them may not be inclined to declare it because they are afraid that we will, it will affect them in having a possible full-time position. So, they tend to hide the injury, they tend to not declare them.... [They avoid seeing me for care because] they were afraid I think of retaliation. (Claire, occupational health nurse)

- 30 In sum, these findings paint a picture of how some employers who strategically hire workers on precarious employment conditions react negatively to workplace injuries among these workers. In a context of extreme knowledge and power differences between employers and precariously employed workers in relation to navigating workers' compensation systems, employers described a variety of strategies for avoiding the costs and liability of workers' compensation claims. At the same time, workers described their fears and concerns about maintaining their employment if they asked employers for formal recognition of their work-related injuries. In some cases, workers' health problems lingered for some time following the unaccommodated injury, but workers coped with them privately.

8. Discussion

- 31 This study was focused on understanding how well workers' compensation and RTW policies fit with the circumstances and needs of precarious workers. To do this, we examined how these workers and employers who hired such workers managed work injury and access to workers' compensation. Employer discourses of workers needing to be "the best of the best", being "easily replaced", and "not a good fit" once they were injured, revealed a positioning of workers as a dispensable product. When an employer

described a worker injured at the workplace as “a danger to themselves and others”, blame for the event was situated with worker behaviour, rather than with the quality of management and safety of the work environment. With these rhetorical strategies, employers distanced themselves morally from a position of responsibility for workers' health, leaving workers without the support they needed to fully access any rights they might have to workers' compensation, all within the context of a “no fault” workers' compensation system. Blaming workers in a no-fault system has been documented elsewhere (Lippel, 1999), as has the stigma associated with claiming workers' compensation (Eakin, MacEachen & Clarke, 2003). Precarious employment is advantageous to employers. For example, it is convenient for client employers to use workers employed by temporary work agencies, as this allows them to avoid legal responsibilities ; directly hiring temporary or part time employees also minimizes cost to the organisations (e.g. low wages, no benefits provided to workers) (Busby & Muthukumaran, 2019 ; MacEachen et al., 2012). In this context, we saw that the ways in which employers informed workers about their rights, in turn, shaped workers' own actions and possibilities for workers' compensation or support. In a context where the law requires the employer to report work injuries to the WSIB, it was possible for workers to be misinformed or dissuaded from accessing their rights to compensation. As well, our findings reinforce how both workers and employers were aware of the workers' economic insecurity and how this condition stunted workers' ability to speak up about poor work conditions and injuries.

- 32 Clearly, not all employers distance themselves from their responsibilities in the way that we saw with employers in this study. However, what this study reveals are weak points in RTW policy, which allow for the possibility of employers distancing themselves from work injury responsibilities, and which heighten the likelihood that workers will not stand up to employers.
- 33 Incentives for workers to remain silent have problematic implications for occupational health and safety issues. Occupational health and safety legislation rests on the assumption that workers will speak up about occupational hazards and injuries. Indeed, in Ontario, this principle is inherent in worker's legal “right to refuse” unsafe work (Occupational Health and Safety Act, 1990) as well as “internal responsibility systems” that require employers and workers to cooperatively manage health and safety approaches within workplaces (Dean, 2010). It is regularly suggested that, if precariously employed workers were better educated about their rights, they might gain improved access to their occupational health and safety rights (Dean, 2010). However, a growing body of evidence draws attention to power relations and economic insecurity that stifle worker voice (Gray, 2002 ; Hall, 2016 ; King and LOARC members, 2010 ; Manapragada and Bruk-Lee, 2016). That is, this study and others show that workers choose to not speak up about their workplace injuries and exposure to hazards because they do not want to jeopardize their tenuous jobs and income (Hall, 2016 ; Hall et al., 2013 ; MacEachen et al., 2012). As well, stigma of being seen as problematic or trying to “take advantage” of the compensation system can prevent injury reporting (Côté et al., 2020). Interestingly, worker fear of reporting workplace accidents is widespread, occurring also among unionized workers (Lewchuk, 2013). A consequence of under-reported workplace injuries is reduced access to treatment and non-accommodation of injuries, leading to potential compounding effects of further injuries

resulting in a costlier recovery that is shouldered by the broader taxpayer-funded social security system (Lippel, 1999 ; MacEachen et al., 2010).

- 34 This study contributes to the scarce literature on the ways in which employers delegitimise the injury claims of precariously employed workers (Gravel et al., 2006 ; Gravel et al., 2017). In this study, employers challenged workers about whether the injury could be attributed to their workplace and described accidents as due to their own carelessness (“they are just a danger to themselves”). Employers also recognized that workers would not challenge such discourses because of their fear of employer retaliation and job loss. These stances exist in a context where employers have little financial initiative to invest in relationships with workers who are temporary or minimum wage. This social distance between employers and workers is even greater for temporary agency workers, who are employed by the agency but overseen on worksites by supervisors of the client employer (Chambel and Castanheira, 2006).
- 35 Workers in this study appeared resigned to their difficult employment conditions (“I was told I could be easily replaced”) and lack of access to worker rights to work injury compensation. Indeed, in precarious employment literature published two decades ago, worker’s “consent” to poor working conditions was recognized as occurring amidst an environment of unease and instability in which workers were cognizant of their dispensability (Smith, 1997). Burawoy (1979) described the “manufacturing of consent” to poor work conditions as akin to inviting workers to play a game in which there is a limited set of choices. Only within this kind of restricted arena, do workers “choose” to not activate their rights to workers’ compensation for occupational injuries.
- 36 Injury attribution is a particular problem facing workers who change jobs often or who hold concurrent jobs, a finding documented in other studies looking at non-standard employment relationships (Quinlan and Mayhew, 1999 ; Underhill and Quinlan, 2011). In these circumstances, it becomes very difficult for them to prove that an occupational injury is attributable to any one job. Although Ontario’s WSIB has a “benefit of doubt” policy that settles a claim in favour of the worker when “the evidence for or against the issue is approximately equal in weight” (Workplace Safety and Insurance Board, 2004), in practice, workers are outmaneuvered by employers given their relative unfamiliarity with the compensation system and their limited resources with which to contest an employer.
- 37 Galanter, an American legal theorist, has written extensively on the consequences of disparity in power between claimants and defendants in the context of legal recourse (Galanter, 1974, 2006). Our findings fit well with his analysis : employers are repeat-players in the workers’ compensation system, they know the ropes and they often have ongoing relationships with the compensation authority. Workers, on the other hand, are unlikely to be repeat players in the compensation system. They usually have one work accident and must rapidly become familiar with the system, while their more experienced employer has the upper hand in terms of knowledge and economic weight. The power disparity between the parties is exacerbated by precarious employment as those workers are the least likely to have the support of a union, an actor that can also be a repeat player in a workers’ compensation system. While Galanter was describing the American court system, and while workers’ compensation systems were designed to expunge the adversarial nature of compensation for injury (Lippel, 1999), our findings suggest that the workers’ compensation system in Ontario may be unsuccessful in responding to the imbalance of power between workers and employers. As well, the

legislation governing WSIB does not legally require corroboration of a worker's description of how their injury occurred if medical evidence confirms the injury and the worker's description of the event that led to the injury is compatible with the injury. Requiring workers to have witnesses to their injury, as occurred for a worker in our sample, cannot be explained by the current legislative provisions, all the more so because of the "benefit of the doubt" policy.

- 38 Employers in this study did little to support the precariously-employed workers' rights to workers' compensation and in some cases appeared to actively discourage claims. A relevant context for employer behaviour is the ever-expanding power and income differences between employers and workers that we have seen in recent decades. While in 1965, an employer's wages were, on average, 20 times that of the typical worker, in 2016, that ratio had grown to 271 to one (Mishel and Scheider, 2017). This is accompanied by shrinking private sector labour unions (Statistics Canada, 2018). With these changes to organizational conditions comes a change in the social contract, that is, common understandings of how to fairly distribute power and resources (ILO, 2016b ; MacEachen, 2019). In recent decades, employers have increasingly turned to low stakes (e.g. minimum wage, part-time) or non-binding (e.g. limited term contract, self-employment) relationships with workers (ILO, 2016a). Although flexible work arrangements are related to employers' need for organizational flexibility amid competitive global marketplaces, what is relevant for workers' compensation policy is how extreme employer-worker inequalities accompany this flexibility, to the extent that one employer in our study avoided labour responsibilities by dismissing low-waged workers as "being unsafe almost intentionally".
- 39 A limitation of this study is its small sample size and limited jurisdictional focus. It would be useful to gather more data about the interactions between precariously-employed workers and the employers who hire them in order to better understand how workers manage to access their rights to workers' compensation and accommodated RTW and what policy changes might better support the growing precariously employed workforce. Further research could also include inter-jurisdictional comparisons of how precariously employed workers adequately access income and injury support following work-related injury and illness.

9. Conclusion

- 40 This study suggests that Ontario workers' compensation and RTW policies may rest uneasily with the circumstances of precariously-employed workers. In particular, it was difficult for workers to make workers' compensation claims, or to sustain a successful claim, when employers resisted this process. We show how employers of precarious workers were well-informed and able to maneuver around their less-informed workers so as to avoid claim submissions. Injury attribution, which is particularly problematic when workers are working concurrent part-time jobs or short-term jobs, was another area where employers could contest claims. Finally, our study explained how precariously-employed workers face difficulties speaking up about workplace injuries as this might lead to deteriorated working conditions, including poor shifts and potential lay off. The employers in our study hired workers in precarious contracts for organizational convenience and it was not clear that they saw themselves as morally responsible for precariously employed injured or ill workers.

Further research is needed on the insights and strategies of precariously employed workers and employers who hire these workers in order to identify key areas for policy reform.

BIBLIOGRAPHIE

Association des commissions des accidents du travail du Canada. (2013). *À propos de l'indemnisation des accidents du travail*. <https://awcbc.org/fr/a-propos-de-lacatc/a-propos-des-lindemnisation-des-accidents-du-travail/>

Association des commissions des accidents du travail du Canada. (2016). *Étendue de la couverture - Industries/Occupations*. https://awcbc.org/wp-content/uploads/2014/02/F_Industries_Occupations_Covered.pdf

Bartel, E., MacEachen, E., Reid-Musson, E., Meyer, S. B., Saunders, R., Bigelow, P., Varatharajan, S. (2019). Stressful by design : Exploring health risks of ride-share work. *Journal of Transport and Health*, 14, 1-12.

Bartkiw, T.J. (2018). Deepening the delusion in the regulation of temporary help agency employment. *Canadian Labour and Employment Law Journal*, 21, 1, 93-116.

Benach, J., Vives, A., Amable, M., Vanroelen, C., Tarafa, G., et Muntaner, C. (2014). Precarious employment : understanding an emerging social determinant of health. *Annual Review of Public Health*, 35, 229-253.

Broughton, A., Green, M., Rickard, C., Swift, S., Eichhorst, W., Tobsch, V., Tros, F. (2016). *Precarious Employment in Europe : Part 1, Patterns, Trends and Policy Strategy*. [www.europarl.europa.eu/RegData/etudes/STUD/2016/587285/IPOL_STU\(2016\)587285_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587285/IPOL_STU(2016)587285_EN.pdf)

Burawoy, M. (1979). *Manufacturing Consent*. Chicago : University of Chicago Press.

Burleton, D., Gulati, S., McDonald, C., et Scarfone, S. (2013). *Jobs in Canada : Where, What and For Whom ?* http://en.copian.ca/library/research/td/jobs_in_canada/jobs_in_canada.pdf

Busby, C., et Muthukumaran, R. (2019). *Precarious Positions : Policy Options to Mitigate Risks in Non-standard Employment*. www.cdhowe.org/public-policy-research/precariou-positions-policy-options-mitigate-risks-non-standard-employment

Chambel, M., Castanheira, F. (2006). Different temporary work status, different behaviors in organization. *Journal of Business and Psychology*, 20, 3, 351-367.

Côté, D., Dubé, J., Gravel, S., Gratton, D., et White, B. W. (2020). Cumulative stigma among injured immigrant workers : a qualitative exploratory study in Montreal (Quebec, Canada). *Disability and Rehabilitation*, 42, 8, 1153-1166.

De Stefano, V. (2016). Introduction : Crowdsourcing, the Gig-Economy and the Law. *Comparative Labor Law and Policy Journal*, 37, 3, 1-10.

Dean, T. (2010). *Comité consultatif d'experts de la santé et de la sécurité au travail*. Toronto.

- Ducharme-Varin, J.-F., Vergara, D., Raynault, M.-F. (2016). *Les travailleurs invisibles : Les risques pour la santé des travailleurs des agences de location de personnel*. <https://numerique.banq.qc.ca/patrimoine/details/52327/2739497>
- Eakin, J. M., MacEachen, E., Clarke, J. (2003). 'Playing it smart' with return to work : small workplace experience under Ontario's policy of self-reliance and early return. *Policy and Practice in Health and Safety*, 1, 2, 19-42.
- Galanter, M. (1974). Why the "haves" come out ahead : speculations on the limits of legal change. *Law and Society Review*, 9, 1, 95.
- Galanter, M. (2006). Planet of the APs : Reflections on the Scale of Law and its Users. *Buffalo Law Review*, 53, 1369-1418.
- Galarneau, D. (2010). L'emploi temporaire en période de ralentissement. *Perspectives*, 11, 11, 5-18.
- Gravel, S., Brodeur, J. M., Champagne, F., Lippel, K., Patry, L., Boucheron, L., Vissandjée, B. (2006). Critères pour apprécier les difficultés d'accès à l'indemnisation des travailleurs immigrants victimes de lésions professionnelles. *PISTES*, 8, 2, 1-15. <https://journals.openedition.org/pistes/3025>
- Gravel, S., Dubé, J., Côté, D., White, B. W., Gratto, D. (2017). Le retour au travail d'immigrants ayant subi une lésion professionnelle : les embûches de la rencontre interculturelle et la précarité du lien d'emploi. *Alterstice*, 7, 1, 21-38.
- Gray, G. (2002). A socio-legal ethnography of the right to refuse unsafe work. *Studies in Law, Politics and Society*, 24, 133 à 169.
- Hall, A. (2016). Trust, uncertainty and the reporting of workplaces hazards and injuries. *Health, Risk and Society*, 18, 7-8, 427-448.
- Hall, A., King, A., Lewchuk, W., Oudyk, J., Naqvi, S. (2013). *Making Participation Work in the New Economy*. www.whsc.on.ca/Files/What-s-New/MakingParticipationWorkInTheNewEconomyFinalReport.aspx
- Hodges, B. D., Kuper, A., et Reeves, S. (2008). Discourse analysis. *British Medical Journal*, 337(a 879), 570 à 572.
- Howard, J. (2017). Nonstandard work arrangements and worker health and safety. *American Journal of Industrial Medicine*, 60, 1, 1-10.
- Kalleberg, A.L. (2011). *Good jobs, bad jobs : the rise of polarized and precarious employment systems in the United States, 1970s to 2000s*.
- King, A., et membres de l'OARC. (2010). *Internal Responsibility : The Challenge and the Crisis*. www.iwh.on.ca/sites/iwh/files/iwh/presentations/iwh_plenary_2010_09_14_aking_article.pdf
- Lewchuk, W. (2013). The limits of voice : are workers afraid to express their health and safety rights ? *Osgoode Hall Law Journal*, 50, 789-812.
- Lewchuk, W., Clarke, M., de Wolff, A. (2008). Working without commitments : precarious employment and health. *Work, Employment and Society*, 22, 3, 387-406.
- Lewchuk, W., Lafleche, M., Dyson, D., Goldring, L., Meisner, A., Procyk, S., Vrankulj, S. (2014). Is precarious employment low income employment ? the changing labour market in southern Ontario Just Labour. *A Canadian Journal of Work and Society*, 22, 51-73.
- Lippel, K. (1999). Therapeutic and anti-therapeutic consequences of workers' compensation. *International Journal of Law and Psychiatry*, 22, 5-6, 521-546.

- Lippel, K. (2019). Strengths and Weaknesses of Regulatory Systems Designed to Prevent Work Disability After Injury or Illness : An Overview of Mechanisms in a Selection of Canadians Compensation Systems In E. MacEachen (Ed.), *The Science and Politics of Work Disability Prevention* (p. 50 à 71). New York : Routledge.
- Lippel, K., MacEachen, E., Saunders, R. et coll. (2011). Legal protections governing the occupational safety and health and workers' compensation of temporary employment agency workers in Canada : reflections on regulatory effectiveness. *Policy and Practice in Health and Safety*, 9, 69-90.
- Lippel, K., Laflamme, A.-M. (2011). Les droits et responsabilités des employeurs et des travailleurs dans un contexte de sous-traitance : enjeux pour la prévention, l'indemnisation et le retour au travail. In *Service de la formation continue du Barreau du Québec* (Ed.), *Développements récents en droit de la santé et sécurité au travail*, 2011 (vol. 334, p. 267 à 360). Cowansville : Éditions Yvon Blais.
- Loi de 1997 sur sécurité professionnelle et l'assurance contre les accidents du travail, L.O. 1997 chap. 16, annexe A, art. 41, (1997 a).
- Loi de 1997 sur sécurité professionnelle et l'assurance contre les accidents du travail, L.O. 1997 chap. 16, annexe A, art. 21, 152 et 158, (1997 b).
- Loi sur la santé et la sécurité au travail, LRO 1990, chap. O.1, par. 43, (1990).
- MacEachen, E. (2019). Work Disability Policy : Current Challenges and New Questions. In E. MacEachen (Ed.), *The Science and Politics of Work Disability Prevention* (p. 3 à 17). New York : Routledge.
- MacEachen, E., Kosny, A., Ferrier, S., et Chambers, L. (2010). The "toxic dose" of system problems : why some injured workers don't return to work as expected. *Journal of Occupational Rehabilitation*, 20, 3, 349 à 366.
- MacEachen, E., Lippel, K., Saunders, R., Kosny, A., Mansfield, E., Carrasco, C., and Pugliese, D. (2012). Workers' compensation experience-rating rules and the danger to workers' safety in the temporary work agency sector. *Policy and Practice in Health and Safety*, 10, 1, 77-95.
- MacEachen, E., Reid-Musson, E., Saunders, R., Meyer, S., Bigelow, P., Kosny, A., Varatharajan, S. (2019). *Driving For Uber : A Developmental Evaluation of Occupational Health and Safety Conditions of Ride-Share Work*. http://ellenmaceachen.ca/wp-content/uploads/2019/07/Driving-for-Uber-Occupational-Health-and-Safety-Conditions_Final-Report-July-15-20192.pdf
- MacEachen, E., Reid Musson, E., Bartel, E., Carriere, J., Meyer, S. B., Varatharajan, S., Saunders, R. (2018). The sharing economy : hazards of being an Uber driver. Texte présenté au 32e congrès triennal de la CIST, à Dublin (Irlande).
- Manapragada, A., Bruk-Lee, V. (2016). Staying silent about safety issues : conceptualizing and measuring safety silence motives. *Accident Analysis and Prevention*, 91, 144-156.
- OIT Organisation internationale du travail (2016 a). *Non-standard employment around the world : understanding challenges, shaping prospects*. www.ilo.org/global/publications/books/WCMS_534326/lang-en/index.htm
- OIT Organisation internationale du travail (2016 b). *Social contract and the future of work : inequality, income security, labour relations and social dialogue*. www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_534205.pdf
- Patterson, M. (2018). *Qui travaille à temps partiel et pourquoi ?* www150.statcan.gc.ca/n1/pub/71-222-x/71-222-x2018002-fra.htm

- QSR International (2014). *NVivo, logiciel d'analyse qualitative de données*. Burlington.
- Quinlan, M. (2004). Workers' compensation and the challenges posed by changing patterns of work : evidence from Australia. *Policy and Practice in Health and Safety*, 2, 1, 25-52.
- Quinlan, M., Bohle, P., Rawlings-Way, O. (2015). Health and safety of homecare workers engaged by temporary employment agencies. *Journal of Industrial Relations*, 57, 1, 94-114.
- Quinlan, M., Mayhew, C. (1999). Precarious employment and workers' compensation. *International Journal of Law and Psychiatry*, 22, 5-6, 491-520.
- Smith, V. (1997). New forms of work organization. *Annual Review of Sociology*, 23, 315-339.
- Statistiques Canada (2018). Déclin de la syndicalisation. Mégatendances canadiennes. www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2015005-fra.htm
- Underhill, E., Quinlan, M. (2011). How Precarious Employment Affects Health and Safety at Work : The Case of Temporary Agency Workers. *Relations industrielles / Industrial Relations*, 66, 3, 397.
- Vosko, L.F., Grundy, J., Casey, R., Noack, A.M., Thomas, M.P. (2018). A tattered quilt : exemptions and special rules under Ontario's Employment Standards Act. *Canadian Labour and Employment Law Journal/Revue canadienne de droit du travail et de l'emploi*, 21, 267-298.
- Workplace Safety and Insurance Board (2004). *Bénéfice du doute*. www.wsib.ca/fr/manuel-politiques-operationnelles/benefice-du-doute

NOTES

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RÉSUMÉS

Les politiques et pratiques concernant l'indemnisation des victimes de lésions professionnelles n'ont pas suivi le rythme des besoins changeants des travailleurs et employeurs résultant de la croissance de l'emploi précaire. Dans cette étude, nous avons cherché à savoir si les politiques concernant l'indemnisation et le retour au travail répondaient aux besoins des travailleurs ontariens qui occupent un emploi précaire. Une analyse critique du discours a guidé l'étude, qui a consisté en entrevues en profondeur menées auprès de quinze travailleurs occupant un emploi précaire et de cinq employeurs qui ont embauché et dirigé ce genre de travailleurs. Nous avons identifié trois domaines pour lesquels les politiques de retour au travail ne sont pas en adéquation avec les besoins des travailleurs précaires. Il s'agit de l'écart en matière de connaissances et de pouvoir entre les employeurs bien informés et les travailleurs vulnérables, des défis liés à l'attribution des blessures et de la crainte des travailleurs à parler ouvertement de leurs accidents de travail. Les résultats de cette étude indiquent que les politiques d'indemnisation et de retour au travail ne sont pas en adéquation avec les besoins des travailleurs occupant un emploi précaire. En particulier, nous avons observé qu'il était difficile

pour eux de faire une demande d'indemnisation quand les employeurs montraient une certaine résistance en cours de processus.

The policies and practices of workers' compensation have barely kept pace with the changing worker and employer needs created by the growth of precarious forms of employment. This study focused on how well workers' compensation and RTW policies in Ontario fit the needs of precariously employed workers. A critical discourse analysis guided our study which consisted of in-depth interviews with 15 precariously-employed workers and 5 employers who had hired and managed these kinds of workers. Three domains where RTW policies fit uneasily with the experiences of precariously-employed workers were identified. These related to knowledge and power contrasts between well-informed employers and vulnerable workers, injury attribution challenges, and worker fear of speaking up about accidents. This study suggests that workers' compensation and RTW policies rest uneasily with the circumstances of precariously-employed workers. In particular, it was difficult for workers to engage with/make a claim for workers' compensation when employers resisted this process.

INDEX

Keywords : return to work, precarious employment, precarious workers, worker benefit, vulnerable workers

Mots-clés : retour au travail, emploi précaire, travailleurs précaires, prestations aux travailleurs, travailleurs vulnérables

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